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6 MICHAEL ZELENY,  
7 Plaintiff,  
8 v.  
9 GAVIN NEWSOM, et al.,  
10 Defendants.

Case No. 17-cv-07357-RS (TSH)

**DISCOVERY ORDER**

Re: Dkt. No. 115

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12 This case is about crusades. Plaintiff Michael Zeleny has been on a crusade to expose the  
13 wrongdoing of a prominent Silicon Valley executive, Min Zhu. From 2005 to 2012 Zeleny staged  
14 public protests of Zhu and his cohorts at New Enterprise Associates and WebEx. Zeleny's  
15 protests took the form of in-person demonstrations, musical performances, and multimedia posts  
16 on YouTube. His protests were intended to be provocative. They included flyers and posters with  
17 graphic content that called out individuals by name. Zeleny eventually combined the First  
18 Amendment with the Second and started openly carrying and displaying unloaded firearms during  
19 his protests.

20 But Zeleny says the City of Menlo Park has been on a crusade too. Fed up with his loud  
21 and unwelcome message, the City allegedly entered into a conspiracy with NEA to stifle Zeleny  
22 and stop his protests. The conspiracy began in 2009, and the City's part of it consisted of  
23 harassing Zeleny, with police constantly stopping and questioning him and his supporters without  
24 any reasonable suspicion of wrongdoing. Undercover officers in unmarked cars trailed him and  
25 his supporters, and followed him wherever he went. The police interfered with his protests,  
26 surveilled him, and falsely branded him a security risk. In 2012 the City went so far as to  
27 frivolously refer Zeleny to the San Mateo County District Attorney's Office for a sham  
28 prosecution for carrying a concealed weapon, which ended in an acquittal. Following the state's

1 adoption of new legislation regarding open carry, the City adopted a new municipal policy that  
2 requires Zeleny to obtain a permit if he is to carry an unloaded firearm during his protests. In  
3 furtherance of the conspiracy, the City has continuously denied Zeleny's applications, all to stifle  
4 his free speech and Second Amendment rights.

5 Or, at least, that's what he says. In an effort to obtain evidence to back up these  
6 accusations, Zeleny served document requests on the City for any documents relating to him or to  
7 any actual or contemplated arrest or criminal prosecution of him. The parties are now before the  
8 Court on a dispute concerning about 40 pages of responsive documents, over which the City  
9 claims the official information privilege.

10 Federal courts recognize a "qualified privilege" for official information. *See Kerr v. U.S.*  
11 *District Court for Northern Dist. of California*, 511 F.2d 192, 198 (9th Cir. 1975).<sup>1</sup> A  
12 governmental entity seeking to invoke the privilege must "make a substantial threshold showing."  
13 *Kelly v. City of San Jose*, 114 F.R.D. 653, 669 (N.D. Cal. 1987). It must, "through competent  
14 declarations," "provide[] the court with *specific* information about how the disclosure of the  
15 subject material, in the situation presented by the case at hand, would harm significant law  
16 enforcement or privacy interests." *Id.* (emphasis original).<sup>2</sup> If it does so, the court must "conduct  
17 a case by case balancing analysis, in which the interests of the party seeking discovery are  
18 weighed against the interests of the governmental entity asserting the privilege." *Soto v. City of*  
19 *Concord*, 162 F.R.D. 603, 613 (N.D. Cal. 1995). The test is "moderately pre-weighted in favor of  
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21 <sup>1</sup> The City also objects to production of these documents pursuant to California Evidence Code §  
22 1040. However, all of Zeleny's claims arise under federal law, *see* Second Amended Complaint,  
23 ECF No. 99, ¶¶ 194-235, so the federal law of privilege applies. *See* Fed. R. Evid. 501. Indeed,  
24 the Ninth Circuit has specifically rejected the application of California Evidence Code § 1040 in a  
25 federal lawsuit alleging a claim under 42 U.S.C. § 1983, *see Kerr*, 511 F.2d at 197, as Zeleny does  
26 here against the City, *see SAC* ¶¶ 218-24 (fourth claim for relief). *See also Kelly v. City of San*  
27 *Jose*, 114 F.R.D. 653, 655 (N.D. Cal. 1987) ("At the outset it is important to emphasize that in a  
28 civil rights case brought under federal statutes questions of privilege are resolved by federal  
law."). The cover page of the parties' joint discovery letter brief, as well as Zeleny's section of  
the letter, says that the City also objects to production based on California Government Code §  
6253(f). However, the City's section of the letter makes no reference to that provision.  
Regardless, as explained, the federal law of privilege applies.

<sup>2</sup> The law enforcement investigatory privilege is similar and does not require separate analysis.  
*See Conan v. City of Fontana*, 2017 WL 2874623, \*4-6 (C.D. Cal. July 5, 2017) (describing the  
privileges as being similar and then analyzing them together).

1 disclosure.” *Kelly*, 114 F.R.D. at 661.

2 Because this is a qualified privilege, we have to start with relevance. If a document is core  
3 to the case, a qualified privilege is easier to overcome. But if it’s collateral or unimportant, there’s  
4 less need to compromise the legitimate interests law enforcement may have in confidentiality. *See*  
5 *Kelly*, 114 F.R.D. at 663 (“Some courts have stated expressly that . . . the importance of the  
6 information sought to the plaintiff’s case is clearly the most important” factor) (citations and  
7 quotations marked omitted). Here, the documents are clearly relevant to Zeleny’s conspiracy  
8 allegations. They are mostly dated 2012 and 2013 (with one in April 2011), during the most  
9 dangerous time in the conspiracy, when the police were harassing Zeleny and his supporters, and  
10 when the City was trying to have him imprisoned on a trumped up concealed-carry charge.

11 But a document has to be relevant to a “claim or defense,” Fed. R. Civ. Proc. 26(b)(1), not  
12 just to an allegation. So, we need to analyze the role the conspiracy plays in Zeleny’s claims  
13 against the City and its police chief. Let’s start with the first claim for relief. Zeleny alleges that  
14 the City threatened him with criminal prosecution by claiming that some of his protest materials  
15 are obscene as to children and he seeks a declaration that they’re not obscene and, more generally,  
16 that his protests are protected First Amendment activity. The role of the conspiracy in this claim  
17 seems to depend on how the City responds to it. If the City says yes, it did make those threats and  
18 his posters are obscene as to children, the claim boils down to evaluating the obscenity status of  
19 some posters, which really has nothing to do with the City’s conduct. But if the City denies  
20 making the threats, or says the threats were because of neutral time, place and manner restrictions,  
21 then the City’s motives become important in deciding who to believe. The conspiracy allegations  
22 function here mostly as evidence of motive and pretext. If they can be borne out by evidence, they  
23 would tend to show that the City’s actions were driven by bias against Zeleny and his message and  
24 that the City’s denials should be disbelieved.

25 In his second claim, Zeleny alleges that the City has wrongly interpreted the state open  
26 carry laws to create three problems (requirement for a permit, unfettered discretion, distinctions  
27 between forms of speech that are not meaningfully different) that give rise to a First Amendment  
28 violation. This claim raises factual questions about whether the City has done these things, but as

1 pleaded, it doesn't seem to turn on bias against Zeleny and his message. Of course, an unfettered  
2 discretion claim looks better to the trier of fact if the plaintiff can also show that the unfettered  
3 discretion was exercised with bias *against him*, so atmospherically the conspiracy allegations help  
4 here, even if they are not the essence of the claim.

5 But things come into sharper focus in the third claim. Here, Zeleny alleges that the City's  
6 policy with respect to issuing permits for people to use unloaded firearms in various types of  
7 performances is unconstitutionally vague. But he also alleges in the alternative in paragraph 215  
8 that the City singled him out to stifle his protests because of the content of his speech. Bias  
9 against Zeleny's message is the core of that contention. And whatever evidence he is able to  
10 assemble of a years-long conspiracy against him is presumably how he would prove that  
11 contention.

12 Finally, any doubt about the relevance of the conspiracy is wiped away by the fourth claim  
13 for relief. Paragraphs 221 and 223 allege that the City threatened Zeleny with criminal  
14 prosecution to silence him and his message. So, while the role of bias against Zeleny's message is  
15 not necessarily clear in the first and second claims for relief, it is an alternative liability theory in  
16 the third claim and the very essence of the fourth claim. Accordingly, the documents at issue are  
17 relevant. And they are not just a little bit relevant. They date from the time Zeleny alleges the  
18 police were constantly harassing him and his supporters, so the police file is among the most  
19 important evidence necessary to evaluate the allegations at the heart of the fourth claim for relief.  
20 Thus, the qualified privilege starts out on shaky ground because these documents look like they're  
21 core.

22 The City's position is not helped by Police Chief Dave Bertini's boilerplate declaration  
23 that is the opposite of substantial and specific. The first two paragraphs state his job title and that  
24 the declaration is based on personal knowledge. The next paragraph says that the police  
25 investigate things, sometimes working with other law enforcement agencies, and keep what they  
26 find confidential. The fourth paragraph appears to be the entire justification for the official  
27 information privilege, and it is so generic the police could use it in any lawsuit about anything:

28 To disclose this official information to the general public, or even in

1 the instant litigation pursuant to a protective order, would irreparably  
2 harm the ability of the Menlo Park Police Department and other law  
3 enforcement agencies (local, state and federal) to conduct criminal  
4 and/or public safety investigations. It is in the interest of justice to  
5 maintain the confidentiality of this material because its production  
6 would necessarily disclose how the Menlo Park Police Department  
7 and other law enforcement agencies obtain information and conduct  
8 their investigations and thus complicate their ability to conduct future  
9 investigations and irreparably damage any ongoing investigations.  
10 The production of this confidential official information would also  
11 disclose private and confidential information about third persons.

12 The paragraph after that states that Zeleny's document requests seek, in part, confidential police  
13 documents. And then Bertini swears the declaration under penalty of perjury. Bertini's  
14 declaration is so lackluster, the Court could overrule the City's privilege claim on this ground  
15 alone. Indeed, *Kelly* holds that the Court *should* do exactly that and not even bother with an *in*  
16 *camera* review if the defendant's affidavit is insufficient. 114 F.R.D. at 671.

17 But in an abundance of caution, the Court has conducted an *in camera* review of the  
18 documents at issue. They contain some information that was sensitive eight years ago, such as  
19 planned visits to the area by a presidential candidate and the Secretary of Defense. There are also  
20 law enforcement updates on then-recent events, suspicious activities, and assessments of security  
threats to the 2012 election. None of the documents are classified. These documents are so stale  
that their production will not in any way undermine legitimate law enforcement objectives.  
Because the documents have the names of specific people in them, including law enforcement  
officers and others, they should not be posted on the internet for the whole world to see, but there  
isn't anything in them that justifies not giving them to Zeleny.

21 The Court **OVERRULES** the City's privilege objection and **ORDERS** it to produce these  
22 documents, subject to an appropriate protective order. Within seven days the parties shall file a  
23 jointly proposed protective order, or they shall file competing proposed orders and a joint  
24 discovery letter brief, not to exceed five pages, arguing for their respective positions.

25 **IT IS SO ORDERED.**

26 Dated: February 28, 2020

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28 THOMAS S. HIXSON  
United States Magistrate Judge